

General Information

Private or Public Statement? - Private

Statement Provider: Bruce Mallonee

Date: November 21, 2014

Location: Bangor, Maine

Previous Statement? No

Statement Gatherer: Rachel George

Support Person: N/A

Additional Individuals Present: Gail Werrbach

Recording Format: Audio

Length of Recording: 35:29

Recording

RG: Alright, it is November 12, 2014. We are here in Bangor, Maine. My name is Rachel George and I'm here today with..

BM: My name is Bruce Corey Mallonee.

RG: Perfect. And the file number is ME-201411-00146. Bruce, have you been informed, understood and signed the consent form?

BM: I have.

RG: Great, and I have to let you know that if at anypoint during this recording you indicate that there is a child or an elder currently in need of protection, or there is imminent risk of serious bodily harm or death to an identifiable person or group, including yourself, that that information may not be protected as confidential. Do you understand?

BM: Understood.

RG: Is there anywhere in particular you would like to start off, or do you want me to just jump into the questions?

BM: I'm happy to start wherever you would like.

RG: Okay. Could you tell me a little bit about your current employment as a judge as well as your past employment as an attorney?

BM: I practiced law for almost thirty years before I became a judge. *[00:01:05.05]* I handled DHHS child protective cases intermittently throughout that time in the earlier part of my career usually as guardian for children, in the latter part usually representing parents. I don't recall whether any of those cases involved either Native children or parents. I'm pretty sure I can tell you that it wasn't an issue at any point. Now I sit on the Maine District court. My primary assignment is in Ellsworth which is the county seat of Hancock county. When I am not there, I am usually taking conflict cases in Washington county so I'm either sitting in Calais or Machias and a large part of that job, a full week of every month, almost a week, sometimes even more than a week of every month is child protective cases and intermittently, they involve different Native groups, most often in my area, most often the Passamaquoddies. I think we had one with the Micmacs and one with the Maliseets.

RG: When did you first learn about the Indian Child Welfare Act?

GW: *[Enters]* I'm so sorry I'm late. Well, there was a bad accident on Stillwater and they weren't letting us get on 95.

[00:02:53.27]

RG: Okay, when did you first learn about the Indian Child Welfare Act?

BM: It was sometime when I was in practice. I wouldn't be able to say when.

RG: Did you receive any kind of training or how was that handled?

BM: It was an incidental reference and I never had to – I don't remember having explored it in any detail. I practice law for 29 years, and so after awhile, particularly after 4 years as a judge, many of those memories mush together. They don't all, but a lot of them do, and this one does because it wasn't a regular or very intensive part of my practice.

RG: Can you tell me a little bit about the cases that you've dealt with involving Native kids as a judge?

BM: Um, I can. I have to make them very generic.

GW: Not the specific cases.

BM: But I have to be even more careful than I might otherwise because the nature of them is that even if they are resolved, they might be unresolved. The children have not grown up yet although most of them are for the time being, resolved, and the cases are not active. I



mentioned, most of the cases I've had have involved the Passamaquoddies. There was one with the Micmacs, one with the Maliseets and the most common features of them have been: I don't think that I've had any of them that did not involve substance abuse. I don't think there have been any that did not involve domestic violence but I can't say that for sure. There was one case that involved serious mental illness by the, by one non-Native parent. The cases are obviously idiosyncratic. The parents are all different and their circumstances are different, and the kids are all different. But, the constant has been all of the tribal representatives have been very conscientious about appearing and about presenting their concerns when invited. All of the attorneys for the tribal groups have been very well-versed in the Indian Child Welfare Act and able to make sure that their client's interests are preserved without in anyway interfering with the primary mission of making sure that the kids are safe and well-cared for *[00:05:57.24]* and in all of them where a Native placement was possible, they have found it and when it wasn't, they have always made sure that they did their preparatory work before hand so that they would be able to approve it as an alternative. It's just been really conscientious, thoughtful people presenting things in a useful and efficient way. Probably ought to mention also that the Assistant Attorneys General who appear before me seem very conscientious about observing the terms of the act.

RG: That's great. So the next question involves a number of different aspects within the act so I'm going to ask about your experiences or challenges that you've seen in working within that portion. So could you describe your challenges that you've seen or any experience in the initial identification of a child as Native American?

BM: There are a lot of parents who don't know and have to ask. There are some parents who -- any parent who thinks he or she has any background with the Passamaquoddies or the Penobscots or any of the five groups you named, they're all really responsive. But there are some groups that are not. And sometimes it's very surprising. I had a parent not long ago who thought he or she, I'm not just being coy I don't remember which it was, thought he or she might have some Cherokee heritage which I thought would be the most well-organized, easily accessed records in the country and they couldn't get a response. They asked several times so sometimes they don't get answers. Sometimes, I imagine the records aren't very good but I don't remember that having been an issue. I think mostly the parents just don't know and if they do, sometimes they're kind of confused about which group it might be. Coming from upstate New York -- who it might be? And I don't know how well-coordinated the different group's records are.

RG: And how about in notification of children to tribal child welfare, so when the state becomes aware of a child that is Native American them notifying the tribes.

BM: I've never had any concern with that. I think they are very conscientious about that.

RG: And how about in working with the state so the tribes working with the state to identify Native American kids?

BM: As far as I know, there is complete cooperation.

RG: Have you seen any challenges in determining jurisdiction or residence of Native American child?

BM: Um, [00:09:11.23] did you say challenges?

RG: Or any experience.

BM: Okay well I'll give you one of each. The challenge has been several times in finding the Native placement for a kid, and um and I think there have been times when the Native group was satisfied with a placement because realistically they knew it was the best one. You know, they were nice people. They were willing to take the kids to events and stuff like that. But some of the foster parents from my limited interactions with them, I would have questioned whether they understood the gravity of what they've been entrusted with and whether they were going to be able to truly convey that gift to the child in their care. So, that's been a challenge. The only specific experience that I had that really brought that to a head was when I had a Native parent and a non-Native parent, there was petition filed, the child was in the Department's custody, the Native parent had not been served and the non-Native parent had been and was there and there was, if I remember correctly, they found a Native placement and the non-Native parent opposed it, to say I don't want my child in a Native home. And, so I asked the ---there was an agreement that the child was going to stay in custody. It was going to be foster placement somewhere. I knew that under ICWA, the issue could be forced, but I wanted to explore it a bit so I asked the, there was a human services person for the tribe or whatever the department is, and a lawyer and I asked them if they knew the source of this issue. And they said they talked with each other for a moment and said this is the first we've heard of it but if this parent's only experience with the group is this other parent then we understand that. And then I took a few moments at the end to --usually at the end of these cases just in general, I try to encourage what the parents are doing--if they are doing something good, I try to encourage them to pursue their substance abuse treatment which it often is. I try to encourage them to continue to see their mental health counselors, to go to their parenting classes, to take care of the things they can take care of. Find something good that they've done and emphasize it as well as to tell them how imperative it is that they take care of the problems quickly so that's kind of the overall context. Well this struck me as a problem that needed to be addressed in the same way so I took a moment to explain to this parent that the child's Native heritage was a gift that she was entitled to receive, that if the case was dismissed and the child was living with that parent, I wouldn't have anything to say about it but so long as I was--the court --I didn't personalize it--but so long as the court was responsible for the child's welfare then that was a part of the child's welfare that we were going to look after. And I don't know that she liked it very much but I think it ---the message seemed to resonate, based on the facial expressions of the other folks in court, at least I hoped it did. You can't see if my fingers are crossed. [00:13:06.10]

RG: How about in child custody hearings? Any challenges or experiences?

BM: Oh in just regular family cases?

RG: In cases involving a Native American child.

BM: I'm sure there had been some, I can't remember, and I don't remember any notable disputes of any kind.

RG: How about in the use of "heightened evidentiary standards" to establish the need for involuntary, out-of-home placement of Native American children? That is a mouthful to say.

BM: Never been an issue. Every time that there's been a non-Native placement, the group approved it. I just never had a dispute about that.

GW: And is there a sense for what the general reason is...why the tribes are approving it or what leads them to decide that that's something they'd approve? Do you have any sense for ..?

BM: I think every single time, they looked for a suitable Native home and they just couldn't find it and they were satisfied because there wasn't one.

GW: The other thing I wanted to ask: The cases that come to your court are ones that are then through the state DHS system, is that right?

BM: Well, I've been emphasizing that because that's where most of these events have occurred but my court handles Department of Health and Human Services protective custody cases and family law cases and protection from abuse cases and criminal cases so there's a whole lot of cross-referencing.

GW: But you're essentially seeing Native kids who are living off reservation or kids who have one parent who is non-Native--in other words, they are not going, if they are Penobscot of Passamaquoddy it's not going through the tribal court, it's coming through the state system, right? So they tend--I'm just trying to get a sense for the population because we've really been noticing—you know, we've really been trying to understand the different court systems for lack of a better word. The Micmac and the Maliseet obviously, they don't have their own tribal courts but the Passamaquoddy and the Penobscot do. So I'm just trying to get a sense for which cases might come through the state courts as compared to the tribal ones.

BM: I can't give you much of an answer because this has never been an issue. I want to say that there's been one case where the Passamaquoddies declined jurisdiction for some statutorily

sufficient reason but that decision had been made and I wasn't asked to rule on anything. It was by consent or otherwise so the case was before me.

RG: What challenges have you witnessed or experiences that you have had in dealing with the requirement for the use of active, remedial, and rehabilitative efforts before ordering an out-of-home placement?

BM: I don't remember anything about cases involving Native kids that differentiate them from the other cases. We always try to avoid taking them away from their parents if we can help it. And the standards are, the standards are fairly stringent. Yet, there has to be a real showing that the child is going to be in danger before you can interfere with the parent's right to raise him or her.

RG: Any specific ICWA procedures for obtaining consent for voluntary out-of-home placements, does that every come up?

BM: Never been an issue of any consequence.

RG: *[00:17:19.00]* In your time as a judge, working within a state court, were there any child welfare cases covered by the Indian Child Welfare Act where the state did not transfer the case to a tribal court?

BM: Yeah, I don't think they have ever transferred any of the cases that I've sat on. I don't think they've ever transferred one to a tribal court, and I hasten to add that this all happens out of my sight. Just because I haven't had an issue to rule on—there's always been a tribal representative, there's always been a tribal lawyer, and there's been no objection raised to the case being decided in Maine District court. So whatever the antecedent issues are, they've all been resolved.

RG: To the best of your knowledge, what are the reasons for the state not transferring the case to tribal court?

BM: I don't know. I could guess but I don't know.

RG: In your time as a judge, were there any---you just mentioned this---cases where the tribe declined to intervene? Are there any other cases that come to your mind? Where that might have been the situation?

BM: Well I don't remember anywhere they declined to intervene, I remember one where they wanted the case decided in district court rather than in tribal court.

RG: Do you recall what the reasoning for that was?

BM: No and they told me, I just don't remember.

RG: What do you consider good cause to deny the transfer to tribal court? I have a list of examples if that helps.

BM: Yeah, it would.

RG: An Indian child's tribe not having a tribal court as defined by ICWA, the preceding was at an advanced stage when the petition to transfer was received, the petitioner didn't file the petition promptly after receiving the notice of the hearing...socioeconomic conditions in tribal social services and or judicial systems are not adequate to care for the child...

BM: Those are good examples. Well certainly if there isn't a tribal court to transfer them to, that would be self-defining. I would think it didn't come up so I have no experience to draw on but I would bend over backwards to honor the jurisdiction of the tribal court if I could and I would have to be persuaded that a child was really going to be either endangered or put in real pain by the failure to have an immediate decision before I would, before I would decline that transfer, which might happen—I mean, we have some terribly distressed kids, there are some who just really shouldn't wait another three months before their case works its way through another system. But that's the only thing I can think of that would lead me to make that decision. I'm not --I wouldn't be jealous of my jurisdiction under those circumstances.

GW: I know this isn't something, maybe, if I understand this correctly that comes to your court but do you--help me understand, when the jurisdiction problems, when a jurisdictional issues comes up, does that come up informally between like, the DHS attorney and the tribal attorney sort of saying where a case is going to live. Is that kind of how it gets worked out?

BM: Yes, I think that is exactly right. In my limited experience with that set of issues that they've always talked to one another before hand..

GW: And sort of just reached those agreements before hand and then the case is going to your case and you hear it or you never hear it at all and it goes to the tribal court?

BM: Yes.

RG: Do you have any experience working with an expert witness under the Indian Child Welfare Act? Or having an expert witness?

BM: Yeah, a little. Yes.

RG: When presenting an expert witness under ICWA, what criteria does the state use to determine or to establish a qualified expert witness, to your knowledge?

BM: I'm thinking of a tribal social services director so it was so obviously qualified to talk about the issues that she knew about that--that nobody challenged it and I didn't have to look into it very deeply.

RG: How often would you say, or in your experience, has the state used an expert witness?

BM: Not very often.

RG: Can you tell me a little bit about what that process is like? Having an expert witness for the state?

BM: It's, I think my own experience was pretty much just factual. What services are available? What homes are available? What do we think should be done with this child and why? I can imagine circumstances in which specific issues of culture or practice might impinge on the state's plan for a child or it might need to be clarified for purposes of making sure the order was complete but that's utter hypothesis. It just hasn't come up.

RG: How often is the existing family exception applied in cases involving a proceeding otherwise covered by ICWA?

BM: I don't remember it ever having come up.

RG: In what ways do you see the Indian Child Welfare Act and the Adoption and Safe Families Act working together and in what ways do you see them not working together?

BM: I don't have any experience of their being in conflict and I don't remember any specific adoption issues coming up. It seems to me that the, there were at least one case and maybe another and this might be an answer where there was a long-term foster placement and maybe even a guardianship that everybody found to be acceptable and that then substituted for what another kid might have been adoption but it was done by agreement [00:24:44.23] and made sense to me so we didn't have to explore it very deeply.

RG: What strengths do you see state child welfare possessing in ensuring ICWA compliance?

BM: I'm glad you asked that question. I feel like I'm so sunny but I feel really good about this process. And I can imagine that the answer somebody in my position might have given 15 years ago would be a whole lot different. But they don't -- the state does not look on this -- at least any of the people I encounter -- they do not look on this as an annoyance they have to accommodate. They look at it as a serious obligation that they have to fulfill and I think that the state Attorneys General are well-versed in ICWA. I think that the workers know whatever they have to know to be able to explore those issues and to make the necessary inquiries and to press for the answers. I think that there is, what appears to be, from my perspective, a serious level of trust and goodwill between the department and all of the tribal groups so that there isn't any, there is no apparent concern about consent or anybody trying to skirt or superficially address ICWA. It's being taken as seriously as it should. [00:26:17.04]

RG: What weaknesses do you see state child welfare possessing in ensuring ICWA compliance?

BM: I can imagine that if there were a person who were academically trained to penetrate the record-keeping and bureaucracies of different Native groups, they might be able to do a more efficient job of ferreting out some of these affiliations by parents who aren't actively associated with a group but who could be.

RG: What strengths do Wabanaki tribes possess in working with the state for ICWA compliance?

BM: Wabanaki as opposed to anybody else--is that an umbrella term for all of these folks? Okay, I thought so but I wasn't sure. Okay. Um, they, they all have these human services. I'm not sure they have the same title every place, but they all have these human services people who seem very capable and they're socially polished so they are able to come into court and they aren't nervous or self conscious. They know they have information that's important for the court and they are able to present it in an effective way. I don't know what kind of resources they have backing them up but by the time they get to where I hear from them, it sounds as though everything's been explored that needs to be explored, and every arrangement that can be made has been made. So I'd say the personnel is good and I have no idea what they have for financial resources to follow through on anything.

RG: What weaknesses do Wabanaki tribes possess in working with the state for ICWA compliance?

BM: None that I know of. *[00:28:13.28]*

RG: Can you tell me a little bit about importance of state attorneys learning and having knowledge about Native American family structure and culture?

BM: That's a really good question. I've not thought of. I like to think that it would be helpful to them to know but I don't think that a lack of such knowledge would prevent them from doing what they are doing now simply because there is so much close cooperation with all of the Native groups that they learn what they need to learn in each case, I think. I'm not privy to those conversations so I can't speak to them first hand but I've never got the sense that the state was tone deaf to something that the tribal group was trying to tell me.

RG: Can you tell me about the importance of a Native child who is placed in out-of-home care to be placed within reasonable proximity to his or her biological family and community?

BM: Well yeah that's what I talked to that one parent about. I really, you know, we all enjoy the benefits of American history but we don't bear it's burdens equally and for a child to be able to realize these gifts he or she has to have access to them and have to have access to them in a way that they can really be conveyed and that means – it means space and time and place and again, they gotta be there with people who can convey it. It isn't enough to honor it in the abstract and that would be true of anybody. It would be true of an Irish American whose grandparents lived in south Boston but there isn't anybody trying to make Irish Americans not be Irish and there is a whole history of course that you know, and I'm telling you things that you know -- of people trying to make Indian kids not be Indian, so there is a big historical burden that I think needs to be addressed especially when a child's parents are falling apart or family is fragmented. *[00:30:45.21]* So I see that as extremely important.

RG: Do you think the Indian Child Welfare Act does enough to protect the rights of Native children and or Native tribes?

BM: I don't know of any shortcoming in it. All the shortcomings I ever encounter are shortcomings in resources, including people. Whether that's traceable to ICWA, I don't know.

RG: Can you talk to that a little bit more, about the shortcomings in resources that you've witnessed?

BM: It's mostly lack of availability of foster placements within Native communities.

RG: How could the state child welfare system improve in terms of the Indian Child Welfare Act in compliance with the act?

BM: I don't know how they could apply it any better than they do, what I would like to see is -- I would like to see some resources directed to *[00:31:55.29]* recruiting and training foster parents within that community, because there may be people who are suitable for doing it but have not thought of it, or who are afraid they won't be able to do it or concerned about some of these relatively high-needs kids that they might be taking care of. And it, and another thing that I would really like to see are counselors from those communities, either Native people who are trained in counseling disciplines or Anglos who are willing to immerse themselves in that setting so that they can talk to kids with a familiarity about these things and not just as I was saying before, not just honoring in the abstract but really being able to engage and tease out some of the kid's experiences and some of their feelings and maybe be able to nurture some of those connections that otherwise would go unaddressed.

RG: If you could change anything or make anything happen for Native kids involved with the Indian Child Welfare Act at either the state, tribal, or federal level, what would you do?

BM: It's not really governmental. I would like for people in the majority community to care more. I'd like for them to understand that Native American communities are an enormous asset to our state and to the larger community in which they are imbedded and that the connection that these children with those communities is part of what they need to grow up into happy, healthy, well-functioning people both within those micro-communities because they aren't very



big and within the community of the state as a whole. And I think that there are components of just simple empathy, care, and understanding that could change the orientation toward what we do with this particular subset of children who are involved in court proceedings but that's not a, you know, that's not something that you can get by changing a statute.

RG: Do you have any questions, Gail? Is there anything else you'd like to add?

BM: Yes, I'm honored to be asked to participate in this. I really appreciate it. This is, I think it's a wonderful thing you are doing and I hope it bears a lot of fruit.

GW: We do too.

RG: Yes, thank you so much for participating, for making time with both of our crazy schedules to sit down.

BM: And it worked

GW: Yes, thank you very much!

BM: Yeah. And if you think of a follow-up question, let me know, you have my email.

GW: Or, the same for you [RG: Yeah] if there's something else that you think.

BM: Oh actually, there's something you can do, would you write down the name of the group that you're wrong, which I...[RG: Yes] I think I have not heard of.

RG: Yes.

[END OF RECORDING]